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Mohammad Aswat Ikram bin Hat & Anor v Sunway International Hotels & Resorts Sdn Bhd & Anor

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-23NCVC-18–03 OF 2020
MOHD JOHAN LEE J
12 AUGUST 2024

C

Tort — Negligence — Hotel — Plaintiffs' son drowned in hotel's jacuzzi and declared brain dead — Second plaintiff suffered PTSD and major depressive disorder — Plaintiffs sued owner and operator of hotel for negligence and breach of contract — Plaintiffs claimed general damages for pain and suffering, D *bereavement, damages for loss of enjoyment of holiday, medical expenses, future medical expenses, pre-trial loss of earnings, loss of earning capacity, and aggravated damages — Whether owner and operator of hotel owed duties in tort and contract towards hotel guests — Whether there was breach of contract and/or negligence by owner and operator of hotel that led to the death of plaintiffs' son — Whether* E *plaintiffs entitled to damages — Civil Law Act 1956 s 7(3A), (3B) & (3C)*

This was the plaintiffs' action for negligence and breach of contract against the first defendant as the owner of a hotel located in Kuala Lumpur ('the hotel'), and the second defendant as the operator of the hotel. The plaintiffs together F with their family had checked into the hotel on 18 August 2018. On the last day of their trip, while the plaintiffs' son ('the deceased') was enjoying himself in the hotel's jacuzzi near the pool area, he was suddenly sucked, immersed and stuck under the water. He was then brought to the hospital but sadly, the doctor informed the plaintiffs that although still breathing, the deceased was G brain dead with no prospect of being resuscitated. The plaintiffs then decided to pull the plug to release the deceased from further agony. Due to the tragic incident, the second plaintiff suffered severe PTSD and major depressive disorder for which she required regular medical treatment. The second plaintiff had been receiving continuous treatment at Sengkang Hospital in Singapore, H the same hospital where she had been working. The issues that arose in the present action were as followed: (a) whether the defendants owed duties in tort and contract towards the hotel guests; (b) whether there was a breach of contract and/or negligence by the defendants that led to the death of the deceased; and (c) whether the plaintiffs entitled to general damages for pain I and suffering, bereavement, damages for loss of enjoyment of holiday, medical expenses, future medical expenses, pre-trial loss of earnings, loss of earning capacity, and aggravated damages.

Held, allowing the plaintiffs' action, and awarding part of the damages sought

by the plaintiffs with costs of RM70,000 to be paid by the defendants to the plaintiffs:

(1) The defendants as the hotel operator owed contractual duties and responsibilities to the plaintiffs as well as common law duty of care. The court agreed with the plaintiffs that the obligation of the defendants as the hotel operator to take reasonable care and skill for the safety of the guests surely must extend to preventing the guests from being exposed to such hidden and unusual dangers (see paras 25–26).

(2) The court found that it was undeniable that the deceased's drowning was caused directly by the defect in the jacuzzi at which the anti-vortex cover was removed or dislodged from the suction hole. The jacuzzi was under the direct control of the defendants. It was therefore the defendants' responsibility to ensure that the jacuzzi was safe and fit for use by the hotel guests. Based on the evidence, the court found that: (a) the defendants failed to conduct regular maintenance on the jacuzzi; and (b) the defendants had no safe system, and their employees were not familiar with the emergency procedures. Therefore, the court found that the liability had been clearly established against the defendants for breach of contract and negligence (see paras 31–32, 43 & 54).

(3) The defendants in their defence pleaded that there was a notice saying that persons under the age of 18 were prohibited from using the jacuzzi. However, based on the evidence, the defendants had failed to prove that the signboard for the jacuzzi had indeed stated what they had pleaded since the photograph of the signboard tendered by the defendants was blurry. The defendants also failed to prove that the jacuzzi signboard was prominently placed at or near the jacuzzi area so that guests using the jacuzzi would not have overlooked it. Furthermore, the defendants had never stopped or prohibited the deceased from using the jacuzzi at that time if truly persons below 18 were prohibited from using the jacuzzi. In conclusion, the court found the plaintiffs had proved their case against the defendants and the defendants were liable on a 100% liability (see paras 57, 62–64 & 68).

(4) In relation to damages, the court made the following orders: (a) general damages for pain and suffering amounting to RM30,000 to the first plaintiff and RM100,000 to the second plaintiff after finding that the proximity between the plaintiffs and the deceased was proven; (b) bereavement amounting to RM5,000 each to the first and second plaintiffs pursuant to s 7(3A), (3B)(b), and (3C) of the Civil Law Act 1956; (c) the claim for damages for loss of enjoyment of holiday was dismissed as the incident happened at the end of the holiday; (d) for medical expenses, the court made no award as to all subsidised payment and only granted SGD913.78 to the first plaintiff, and SGD26,383.05 to the second plaintiff; (e) for future medical expenses, the court had only

awarded the amount of SGD78,000 for three years treatment considering that the second plaintiff's doctor was not called as witness to support the claim; (f) the plaintiffs failed to prove the pre-trial loss of earnings and loss of earning capacity; (g) there was no justifiable reason for the court to award aggravated damages in the present case; and (h) the court adopted the currency exchange rate of SGD1 = RM3.30 for all expenses incurred pre-trial, and SGD1 = RM3.60 for all future expanses (see paras 71–78, 80–84, 88, 90, 92–95, 97 & 99).

[Bahasa Malaysia summary

Ini merupakan tindakan plaintif-plaintif bagi kecuaian dan pelanggaran kontrak terhadap defendan pertama sebagai pemilik sebuah hotel yang terletak di Kuala Lumpur ('hotel tersebut'), dan defendan kedua sebagai pengendali hotel tersebut. Plaintif-plaintif bersama keluarga mereka telah mendaftar masuk ke hotel tersebut pada 18 Ogos 2018. Pada hari terakhir percutian mereka, semasa anak lelaki plaintif-plaintif ('si mati') sedang menggunakan jakuzi hotel tersebut yang terletak berhampiran kawasan kolam renang, dia tiba-tiba disedut, termasuk ke dalam dan terperangkap di bawah air. Dia kemudian dibawa ke hospital tetapi malangnya, doktor memaklumkan kepada plaintif-plaintif bahawa walaupun masih bernafas, si mati telah mati otak dan tiada kemungkinan untuk diselamatkan. Plaintif-plaintif kemudian memutuskan untuk menghentikan rawatan untuk membebaskan si mati daripada kesakitan yang berpanjangan. Disebabkan kejadian tragis tersebut, plaintif kedua mengalami PTSD yang teruk dan penyakit kemurungan major yang memerlukan rawatan perubatan secara berkala. Plaintif kedua telah menerima rawatan berterusan di Hospital Sengkang di Singapura, hospital yang sama tempat dia bekerja. Isu-isu yang timbul dalam tindakan semasa adalah seperti berikut: (a) sama ada defendan-defendan mempunyai kewajipan dalam tort dan kontrak terhadap tetamu hotel; (b) sama ada terdapat pelanggaran kontrak dan/atau kecuaian oleh defendan-defendan yang menyebabkan kematian si mati; dan (c) sama ada plaintif-plaintif berhak mendapat ganti rugi am untuk kesakitan dan penderitaan, ganti rugi kesedihan, ganti rugi kerana kehilangan keseronokan percutian, perbelanjaan perubatan, perbelanjaan perubatan masa hadapan, kehilangan pendapatan pra-perbicaraan, kehilangan keupayaan mencari rezeki, dan ganti rugi teruk.

Diputuskan, membenarkan tindakan plaintif-plaintif, dan mengawardkan sebahagian daripada ganti rugi yang dituntut oleh plaintif-plaintif dengan kos sebanyak RM70,000 yang perlu dibayar oleh defendan-defendan kepada plaintif-plaintif:

(1) Defendan-defendan sebagai pengendali hotel mempunyai tugas dan kewajipan kontraktual kepada plaintif-plaintif serta kewajipan berjaga-jaga 'common law'. Mahkamah bersetuju dengan plaintif-plaintif bahawa kewajipan defendan-defendan sebagai

pengendali hotel untuk mengambil langkah berjaga-jaga dan kemahiran yang munasabah untuk keselamatan tetamu pastinya perlu dilanjutkan kepada mencegah tetamu daripada terdedah kepada bahaya yang tersembunyi dan luar biasa tersebut (lihat perenggan 25–26).

(2) Mahkamah mendapati bahawa tidak dapat dinafikan yang kejadian lemas si mati adalah secara langsung disebabkan oleh kecacatan pada jakuzi di mana penutup anti-vorteks telah ditanggalkan atau dicabut dari lubang sedutan. Jakuzi tersebut berada di bawah kawalan langsung defendan-defendan. Oleh itu, adalah menjadi tanggungjawab defendan-defendan untuk memastikan jakuzi tersebut selamat dan sesuai untuk digunakan oleh tetamu hotel. Berdasarkan keterangan, mahkamah mendapati bahawa: (a) defendan-defendan gagal menjalankan penyelenggaraan berkala pada jakuzi tersebut; dan (b) defendan-defendan tidak mempunyai sistem yang selamat, dan pekerja-pekerja mereka tidak biasa dengan prosedur kecemasan. Oleh itu, mahkamah mendapati bahawa liabiliti telah dibuktikan dengan jelas terhadap defendan-defendan atas pelanggaran kontrak dan kecuaian (lihat perenggan 31–32, 43 & 54).

(3) Defendan-defendan dalam pembelaan mereka mendakwa bahawa terdapat notis yang mengatakan bahawa individu di bawah umur 18 tahun dilarang menggunakan jakuzi. Walau bagaimanapun, berdasarkan keterangan, defendan-defendan telah gagal membuktikan bahawa papan tanda untuk jakuzi tersebut sememangnya menyatakan apa yang mereka telah dakwa memandangkan gambar papan tanda yang dikemukakan oleh defendan-defendan adalah kabur. Defendan-defendan juga gagal membuktikan bahawa papan tanda jakuzi tersebut diletakkan dengan jelas di atau berhampiran kawasan jakuzi bagi memastikan tetamu yang menggunakan jakuzi tersebut tidak terlepas pandang. Tambahan pula, defendan-defendan tidak pernah menghentikan atau melarang si mati daripada menggunakan jakuzi pada masa tersebut jika benar bahawa individu di bawah umur 18 tahun dilarang menggunakan jakuzi. Kesimpulannya, mahkamah mendapati plaintif-plaintif telah membuktikan kes mereka terhadap defendan-defendan dan defendan-defendan bertanggungjawab atas liabiliti 100% (lihat perenggan 57, 62–64 & 68).

(4) Berhubung dengan ganti rugi, mahkamah telah membuat perintah-perintah berikut: (a) ganti rugi am untuk kesakitan dan penderitaan berjumlah RM30,000 kepada plaintif pertama dan RM100,000 kepada plaintif kedua setelah mendapati kedekatan antara plaintif-plaintif dan si mati telah terbukti; (b) ganti rugi kesedihan berjumlah RM5,000 setiap seorang kepada plaintif pertama dan kedua menurut s 7(3A), (3B)(b), dan (3C) Akta Undang-undang Sivil 1956; (c) tuntutan ganti rugi untuk kehilangan keseronokan percutian telah

ditolak kerana kejadian tersebut berlaku pada hari terakhir percutian mereka; (d) untuk perbelanjaan perubatan, mahkamah tidak membuat apa-apa award untuk semua pembayaran yang disubsidi dan hanya memberikan SGD913.78 kepada plaintif pertama, dan SGD26,383.05 kepada plaintif kedua; (e) untuk perbelanjaan perubatan masa hadapan, mahkamah hanya mengawardkan jumlah SGD78,000 untuk rawatan tiga tahun memandangkan doktor plaintif kedua tidak dipanggil sebagai saksi untuk menyokong tuntutan tersebut; (f) plaintif-plaintif gagal membuktikan kehilangan pendapatan pra-perbicaraan dan kehilangan keupayaan mencari rezeki; (g) tiada sebab yang wajar untuk mahkamah mengawardkan ganti rugi teruk dalam kes semasa; dan (h) mahkamah menerima pakai kadar pertukaran mata wang SGD1 = RM3.30 untuk semua perbelanjaan yang ditanggung pra-perbicaraan, dan SGD1 = RM3.60 untuk semua perbelanjaan masa hadapan (lihat perenggan 71–78, 80–84, 88, 90, 92–95, 97 & 99).]

Cases referred to

Alcock and others v Chief Constable of the South Yorkshire Police [1991] 4 All ER 907, HL (refd)

Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor [1995] 2 MLJ 100, HC (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685, FC (refd)

Eng Beng v Lo Kok Jong [2023] SCD 142; [2023] SGHC 63, HC (refd)

Heng Lee Suan v YTC Hotels Ltd (trading as Paramount Hotel) [2008] SCD 142; [2008] SGHC 111, HC (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (refd)

Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors [1983] 2 MLJ 51, FC (refd)

M Badiuzzaman and others v Salma Islam and others [2023] SCD 463; [2023] SGHC 311, HC (refd)

Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo [2020] 1 MLJ 440, FC (refd)

Muhamad Mustaqim bin Jidin v Mohd Zulfadhli bin Radzali & Ors [2017] MLJU 862, HC (folld)

Pang Koi Fa v Lim Djoe Phing [1993] SCD 98; [1993] 3 SLR 317, HC (refd)

Premier Hotel Sdn Bhd v Tang Ling Seng [1995] 4 MLJ 229, HC (refd)

Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 5 MLJ 360, CA (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)

Siew Pick Chiang v Hyundai Engineering and Construction Co Ltd and another [2016] SCD 360; [2016] SGHC 266, HC (folld)

Legislation referred to

Civil Law Act 1956 s 7, 7(3A), (3C), (3B)
Evidence Act 1950 ss 101(1), 103

Liew Teck Huat (with Lim Qi Si, Ong Kang Nyong and Kathleen Samantha George) (Zaid Ibrahim Suflan T H Liew & Partners) for the plaintiffs.
Ho Kee Tong (with Sukhdeep Singh) (Gan, Ho & Razlan Hadri) for the defendants.

Mohd Johan Lee J:

INTRODUCTION

[1] The plaintiffs filed this suit against the defendants for breach of contract and/or negligence.

[2] After a careful consideration and on the balance of probabilities, I find that the plaintiffs have successfully established their case against the defendants. I therefore decided in favour of the plaintiff. However, I have awarded only a part of the damages they sought. This is the ground for this decision.

Background facts

[3] The plaintiffs are a married couple. They are Singaporean nationals living in Johor Bahru. They had two sons, Child A ('the deceased') and Child B.

[4] The first plaintiff is a Baggage Handler with Singapore Air Terminal Services Ltd while the second plaintiff works as a Call Centre Executive at Sengkang Hospital.

[5] The first defendant is a company incorporated in Malaysia and engages in the business of providing management, advisory, supervisory and other related services for the operation and management of hotels.

[6] The second defendant is and was at all material times the operator of the Sunway Putra Hotel ('the hotel') located at Sunway Putra Plance, No 100 Jalan Putra, Chow Kit, 50350 Kuala Lumpur, Wilayah Persekutuan, Kuala Lumpur, Malaysia. The hotel is owned by the first defendant.

[7] On 18 August 2018, the plaintiffs together with their family checked into the hotel. On the last day of their trip ie, 21 August 2018, the deceased together with his younger brother and cousin left for the pool accompanied by their two respective domestic helpers.

[8] The pool area was under the watch of the defendants' employees.

[9] Unfortunately, while the deceased was enjoying himself in the jacuzzi, he was suddenly sucked, immersed and stuck under the water. The domestic helpers started shouting for help whereupon the defendants' employees rushed to the jacuzzi to try to pull the deceased out from the bottom. However, they were unable to pull the deceased out from the water because he was stuck underneath as a result of some form of suction. One of the domestic helpers went up to the plaintiffs' room to inform them of the unfortunate incident that happened to the deceased. Upon hearing this, the plaintiffs rushed down to the pool area where they noticed that the deceased was floating with his face down in the jacuzzi.

[10] The first plaintiff immediately rushed into the jacuzzi to pull the deceased out. The deceased was visibly turning blue, bloated and unconscious.

[11] The first plaintiff then began administering CPR to try to revive the deceased and at some point, afterward, one of the defendants' employees rendered assistance to the first plaintiff by administering CPR to the deceased.

[12] The deceased was later conveyed to the hospital however he was still blue and unconscious at that time. Upon arriving at the hospital, the deceased was immediately placed in the ICU with multiple intubations for respiratory aid. Regretfully, the doctor informed the plaintiffs that although the deceased was still breathing, he was brain dead with no prospect of being resuscitated. At that point, the plaintiffs made the heart wrenching decision which was to pull the plug to release the deceased from further agony.

[13] Even though five years have passed since the tragic incident, the second plaintiff still suffers from severe PTSD and major depressive disorder for which she requires regular medical treatment. The second plaintiff has been receiving continuous treatment at Sengkang Hospital, the same hospital where she has been working.

[14] Following the above unfortunate incident, the plaintiffs filed this action against the defendants for breach of contract and/or negligence.

The trial

[15] During the trial, the plaintiffs and the defendants each called four witnesses as follows:

(a) PW1 second plaintiff;

(b) PW2 first plaintiff;

(c) PW3 Dr Brian Yeo Kah Loke;

(d) PW4 Rinadia bte Ab Rashid;

(e) DW1 Sangkar a/l Rajoo;

(f) DW2 Norhisham bin Bujang;

(g) DW3 Mohd Asraf bin Ibrahim; and

(h) DW4 Dr Mohammad Fitri bin Zainuddin.

Issued to be tried

[16] Before the trial, the parties had agreed on the issues to be tried as follows:

(a) whether the first and/or second defendants as owner and/or operator of the Hotel owed a duty of care to the plaintiffs and their family members as paying guests of the hotel, to exercise reasonable care and skill to ensure that the Hotel premises and facilities available for use by paying guests, are in good and serviceable condition, fit and safe for use by paying guests including the plaintiffs and their family members;

(b) whether it was reasonably foreseeable on the part of the first and/or second defendant that if the hotel premises or any part thereof or any of its facilities are defective and/or unsafe for use, the plaintiffs and paying guests lawfully on the hotel premises would be exposed to risks of injury and/or death;

(c) whether the first and/or second defendants were in breach of contract and/or negligent in failing to exercise reasonable care and skill to ensure that the hotel facilities, in particular, the jacuzzi was in a fit and safe condition to be used by the plaintiffs and their family members and whether sufficient notice and/or warning was given by the hotel's staff regarding the restriction of usage of the jacuzzi for guests below 18 years of age;

(d) whether the jacuzzi at the hotel's premises was defective and unsafe for use in that the round-metal anti-vortex cover of the jacuzzi pool was faulty and malfunctioned as it was not locked or held in place so as to prevent suction which caused the deceased to be drowned in the jacuzzi and/or pool;

(e) whether the death of the deceased was wholly and/or substantially caused by and/or contributed by his own negligence and/or by the negligence, failures and omissions of the first and/or second plaintiffs; and

(f) whether the plaintiffs suffered loss and damage including aggravated damages by reason of the death of the deceased due to the breach or

breaches of contract and/or duty or negligence on the part of the first and/or second defendants, and if so, what should be the reasonable quantum of damages to be awarded to the plaintiffs.

FINDINGS AND DECISION OF THE COURT

[17] The plaintiffs claimed that the defendants owed duties to the plaintiffs in contract and torts. It is my finding that the plaintiffs had successfully proved and established their claim on the balance of probabilities. I shall address the issues in turn.

[18] The law is trite that the plaintiffs bear the burden of proof to prove their claim against the defendant. I refer to ss 101(1) and 103 of the Evidence Act 1950 as follows:

> 101 Burden of proof
>
> ...
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 103 Burden of proof as to particular fact.
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[19] In the Federal Court case of *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885, Abdul Hamid Embong FCJ (as he then was) in delivering the judgment of the court held:

> The standard of proof in civil cases is the legal standard to which a party is required to prove its case, namely on a balance of probabilities. In civil litigation, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not.

Whether the defendants owed duties in tort and contract towards the hotel guests

[20] In this case, the plaintiffs' claim against the defendants is founded on both contract and torts. The plaintiffs referred to the case of *Heng Lee Suan v YTC Hotels Ltd (trading as Paramount Hotel)* [2008] SCD 142; [2008] SGHC 111 where a duty is explained as follows:

> The plaintiff's claim was based on contract (as a paying guest of the hotel) and in tort (as an invitee of the defendant who owed her a duty of care since she was an occupier of the hotel). There can be no dispute that the defendant's obligations to

the plaintiff as their contractual entrant was to take reasonable care to ensure that the hotel's premises were safe for her and the purposes of its other guests.

[21] The plaintiffs further referred to the case of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360 as follows:

> Negligence is a tort and three things must be proved to support the claimant's claim:
>
> (a) that the defendant owes the claimant plaintiff a duty of care;
>
> (b) that the defendant is in breach of that duty of care; and
>
> (c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.

[22] Based on the above, the plaintiffs submitted that the duty is therefore a specific application of the general duty of care test.

[23] The plaintiffs further submitted that ensuring that a jacuzzi is safe for guests to use falls within the duty of care. It is plainly apparent that the danger from the suction power of the jacuzzi is an unusual danger which a notional, reasonable person would not be aware of. The hotel guest would only see that the jacuzzi is working and open for use. One would then just step into the jacuzzi to enjoy it. One would not be aware of the hidden danger within and beneath the water, neither would one suspect that there is a hidden danger beneath the water.

[24] The plaintiffs further referred to the Federal Court case of *Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors* [1983] 2 MLJ 51 where the Federal Court held:

> And with respect to such a visitor at least, we consider it is settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damages for unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact ...

[25] The plaintiff submitted that the obligation of the defendants as the hotel operator to take reasonable care and skill for the safety of the guests surely must extend to preventing the guests from being exposed to such hidden and unusual dangers.

[26] I agree with the plaintiffs on this. The defendants as the hotel operator

owed contractual duties and responsibilities to the plaintiffs as well as common law duty of care.

Whether there was a breach of contract and/or negligence on part of the defendants that led to the death of the deceased

[27] The plaintiffs submitted that the deceased's drowning in the jacuzzi was caused by the breach of contract and/or duty and/or negligence of the defendants.

[28] Firstly, the plaintiffs submitted that the suction hole in the jacuzzi was covered and locked with the round anti-vortex cover which had to remain secured at all times. This was confirmed by DWS1 during the cross-examination as follows:

PC: ... the cover is fixed to the suction hole with the four screws.

DW1: ... Yes, sure.

PC: The four screws are tighten to make sure that the cover is firmly in place, correct?

DW1: Correct Sir.

PC And these cover at the suction hole is supposed to be firmly emplace during at all times, right?

DW1: Yes sir.

(Refer Notes of Evidence, p 901, Line 1–11)

[29] DW1 also confirmed the consequences if the cover of the suction hole was removed or dislodged from the suction hole as follows:

PC: But if the cover is loose or if it is removed, ... Then suction hole become exposed?

DW1: Yes.

PC: And when the suction hole is exposed, right that's when the pressure from the suction hole were then pull then victim down and then he got stuck to the suction hole. Would that be accurate? DW1 Yes Sir, confirm. PC So this pressure in the suction hole is very strong, that's why you keep it covered, correct?

DW1: Yes, of course.

(Refer Notes of Proceedings, p 863, Line 8–19)

[30] DW1 further confirmed the cause of drowning as follows:

PC: So, did you then find out what was the cause of this person suffering the drowning in the jacuzzi. Did you find out? DW1 Yes, based on the suction pressure

of jacuzzi. That is the one of the main reason. A

(Refer Notes of Proceedings, p 854, Line 6–9)

[31] Based on the above, I find it is undeniable that the deceased's drowning was caused directly by the defect in the jacuzzi at which the anti-vortex cover was removed or dislodged from the suction hole. B

[32] The jacuzzi was under the direct control of the defendants. It was therefore the defendants' responsibility to ensure that the jacuzzi was safe and fit for use by the hotel guests. C

[33] The defendants on the other hand alleged that they had undertaken regular maintenance work. The defendants also alleged that the deceased himself was the one who removed the vortex cover. Therefore, the blame cannot be put solely on the defendants. Rather, the defendants invoked a contributory negligence which led to the deceased's death. D

[34] I will now look into the defendants' allegations critically. Firstly, the regular maintenance work as alleged by the defendants. The defendants relied on a Testing and Commissioning Report by Vinfaat Sdn Bhd ('the testing report'). E

[35] A careful perusal of the testing report would show that it was issued in November 2017 ie, nine months before the drowning incident happened. Apart from that, I find that the testing report was not for the regular maintenance work. Moreover, the testing report did not indicated any maintenance or inspection work done on the anti-vortex cover of the jacuzzi. F

[36] There was a clear admission by DW1 during the cross-examination as follows: G

PC: Ok, so this document you therefore agree that does not contain any work in respect of checking on maintenance of cover of the suction hole of the jacuzzi, correct?

DW1: Yes, this one. The Vinfaat will check all the system, the piping system plus the pump system. H

PC: I understand but they don't do maintenance work on the cover of the suction hole into jacuzzi, right?

DW1 No. I

(Refer Notes of Proceedings, p 846, Line 1–9)

[37] The defendants further referred to maintenance records of the

swimming pool and jacuzzi ('the maintenance records').

[38] However, the plaintiffs submitted that the maintenance records did not showed any maintenance or inspection work done on the anti-vortex cover of the jacuzzi. Instead, the maintenance records set out generic and routine work done months on end without dealing with the issue of the defective anti-vortex cover.

[39] DW1 testified during the cross-examination as follows:

> PC: Well, so Mr Sangkar. Can I just ask you to confirm, if you look at all these maintenance record which you have produced, we don't see any entry in here which says that certain maintenance or repair work had been done to the cover of the suction hole at the jacuzzi, correct?
>
> DW1: Yes
>
> (Refer Notes of Proceedings, p 851, Line 1–3)

[40] Based on the above, DW1 agreed that if the maintenance or repair work was conducted on the anti-vortex cover, it would have been reflected in the maintenance records. However, it is my finding that there was nothing in the maintenance records that showed a maintenance or repair work had been conducted on the anti-vortex cover.

[41] The defendants further alleged that a daily inspection was conducted by the maintenance department on all the system and facilities, and it was done at the beginning of the three daily shifts.

[42] However, not a single shred of evidence was produced on the alleged daily inspection. Therefore, the court has no other option but to reject such allegation.

[43] Based on the above, I find that the defendants had failed to conduct regular maintenance on the jacuzzi especially on the anti-vortex cover to ensure that the jacuzzi was safe to use for the Hotel guests including the plaintiffs and the deceased.

[44] Having found that the defective anti-vortex covers directly caused the deceased to be struck and drown in the jacuzzi, I will now look in the allegations by the plaintiffs that the defendants had failed to take preventive measures to prevent the deceased from further drowning.

[45] The plaintiffs submitted that when the deceased was sucked under the jacuzzi, it created an emergency situation. The immediate response that should

be taken by the defendants' employees was to switch off the jacuzzi. This would have immediately deactivated the pressure from the suction hole which would probably have prevented his drowning.

[46] During the cross-examination, DW1 and DW3 admitted that the immediate step to be taken during the emergency was to switch off the jacuzzi. This can be seen as follows:

> PC: Mr. Sangkar, when an emergency happens in the jacuzzi while in operation that some one gets sucked to the bottom, right would you agree that the first thing to do would be to switch off the jacuzzi to stop the operation of the jacuzzi. So that the suction will also stop? Correct? DW1 Yes Sir, sure must be.
>
> (Refer Notes of Proceedings, p 940, Line 2–6)
>
> PC: So kalau kita ambil ini dulu, respond to all situation safely and promptly, this would require Encik at the emergency, when the emergency happened at the jacuzzi, to promptly switch off the switch. Betul tak? This is to promptly respond to that situation, betul?
>
> DW3: Setuju.'
>
> (Refer Notes of Proceedings, p 1104, Line 6–11)

[47] Further, DW3 also testified that the switch was located very close to the jacuzzi:

> PC: So can you tell his Lordship where is the switch of this jacuzzi?
>
> DW3: Beside the jacuzzi.
>
> PC: Beside means where, it is not on the jacuzzi?
>
> DW3: No. Outside, just nearby. Sebelah jacuzzi. Beside of jacuzzi. PC Ok, so it is very easy to just go and switch it off right, correct Encik Asraf?
>
> DW3: Betul, easy.
>
> (Refer Notes of Proceedings, pp 1093–1094, Line 19 and 6 respectively)

[48] As this matter is highly pertinent, I further clarified with DW3 on the location of the switch as follows:

> Court :Jakuzi tu, suis dia ni jenis suis yang tepi dia ataupun jauh daripada, makna dia tepi dia sebab ada hotel ni, jakuzi dia suis dia adalah kita, kalau kita nak pakai, kita tekan baru dia fungsi. Adakah ini jenis yang macam tu ataupun ini suis dia berada di satu tempat macam suis lampu bilik macam tu?
>
> DW3: Untuk suis jakuzi macam Yang Arif beritahu tadi, iaitu yang nombor dua, di mana hotel Sunway Putra yang pakai sekarang, suis dia berasingan tetapi berdekatan dengan jakuzi. Court Berapa jauh daripada jakuzi, kalau kata berdekatan, berapa dekat tu? Dalam anggaran meter ke?

DW3: Kalau satu depa, anggaran saya lebih kurang dalam satu depa.

(Refer Notes of Proceedings, p 1117, Line 2–13)

[49] The plaintiffs then referred this court to the job descriptions issued by Sunway Putra Hotel which can be found in defendants' Supplementary Bundle of Documents (II) at pp 2–4 which stated that emergency response is part of the operational duties of DW3 as a pool attendant.

[50] The plaintiffs submitted that DW3 had failed to comply with the operational duties, specifically emergency response. If DW3 had done so, the deceased's drowning would have probably been averted.

[51] The plaintiffs further referred this court to the police report dated 21 August 2018 by DW3 where DWS3 said he and Aidil struggled for almost ten minutes to try to pull the deceased out of the water.

[52] Based on the earlier testimony by DW1, the pressure from the suction hole was so strong that the suction hole must be covered. Should the jacuzzi have been immediately switched off, the pressure at the suction hole would be deactivated and the deceased would not have remained stuck at the suction hole underneath the water.

[53] The fact that DW3 was struggling for almost ten minutes and did not switch the jacuzzi off clearly indicated that the defendants' pool attendants had failed to discharge their responsibility in effecting the emergency response, resulting in the death of the deceased.

[54] All of the above indicated that the defendants had no safe system, and their employees were not familiar with the emergency procedures. Therefore, I found that the liability has been clearly established against the defendants for breach of contract and negligence.

[55] Next, the defendants in their defence relied on rules and regulations placed on signboards which they characterised as warning signs.

[56] I shall first discuss the contents of the signboard. Refer to p 1 of the defendants' Bundle of Documents, there was indeed such a signboard for swimming pool that states, among others, 'No Lifeguard on Duty'.

[57] As for the jacuzzi, there was no clear image of the notice provided by the defendants. However, the defendants in their defence pleaded that there is such a notice saying that persons under the age of 18 were prohibited from using the jacuzzi.

[58] Clearly, the defendants were trying to escape liability by placing the warning sign. However, for the defendants to be able to do so, the warning sign must be clear and explicit.

[59] This is governed by the contra proferentum rule. I refer to the Federal Court case of *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440 that held that:

> Coming to the contra proferentum rule, it provides that where a term is ambiguous, such ambiguity ought to be construed against the party who prepared it. In general contracts, common law courts have been quick to apply against 'unfair terms' like exclusion or exemption clauses. But the rule sees particular application in insurance contracts. This point is aptly summarised in *Mac Gillvray on Insurance Law* (12th Ed), at pp 317–318:
>
> > The common law rule of construction, that verba chartarum forties accipiuntur contra proferentum, means that ambiguity in the wording in a policy, or slip, is to be resolved against the party who prepared it. It has been said that a party who proffers an instrument cannot be permitted to use ambiguous words in the hopes that the other party understand them in a particular sense and that the court which has to construe them will give them a different meaning, but the ambiguity usually arises inadvertently from including conflicting standard printed clauses in the same policy.

[60] I also refer to the case of *Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor* [1995] 2 MLJ 100 where the appellant in that case left his car to be waxed and polished by the respondents and was given a receipt to claim for his car. At the back of the receipt, a clause provided as follows: 'the company is not liable for any loss or damage whatsoever of or to the vehicle, its accessories, or contents. Vehicles and goods are at owner's risk'. The car was damaged while being driven by an employee of the second respondent. The magistrate held that the exclusion clause exonerated the respondents. On appeal, the High Court allowed the appellant's appeal and held that an exclusion clause, however wide and general, did not exonerate the respondents from the burden of proving that the damage caused to the car was not due to their negligence and misconduct.

[61] In the case of *Premier Hotel Sdn Bhd v Tang Ling Seng* [1995] 4 MLJ 229, the respondent stayed at the hotel owned by the appellant. One afternoon he left his room key with the receptionist who gave it to an unknown person. Upon the respondent's claim for the loss of his personal belongings, the appellant relied on an exclusion clause which states that 'the Hotel will not assume responsibility for valuables or money lost from the room'. The court held that these general words would not ordinarily protect a party from liability for negligence. To be effective, the words must be sufficiently clear, either by

A referring to negligence or by using some other expression such as 'however caused'.

[62] After a careful consideration of the evidence presented before me, I find that the defendants have failed to prove that the signboard for the jacuzzi has indeed stated what they had pleaded since the photograph of the signboard tendered by the defendants was blurry.

[63] Next, the defendants also failed to prove that the jacuzzi signboard was prominently placed at or near the jacuzzi area so that guests using the jacuzzi would not have overlooked it. The photograph of the signboard once again failed to show or specify the exact location of the signboard.

[64] Furthermore, the defendants had never stopped or prohibited the deceased from using the jacuzzi at that time if truly persons below 18 were prohibited from using the jacuzzi.

[65] Based on the CCTV clips, it did not show that any of the defendants' employees spoke with the deceased or the domestic helpers when he was in the jacuzzi.

[66] DW3 also did not state in his police report that he had warned the deceased not to use the jacuzzi as it was against the rule. If the jacuzzi signboard was meant to be a strict policy for an exclusion of liability notice, it would be very important for DW3 to specifically point this out when making a formal statement in a police report.

[67] Based on the above, I find that the defendants could not be excluded from liability and the defence based on the signboard must fail.

[68] In conclusion, I find that the plaintiffs have proved their case against the defendants. Therefore, the defendants are liable on a 100% liability.

QUANTUM

General damages for pain and suffering

[69] Having proved that the defendants were liable, the plaintiffs submitted that they were entitled to general damages for pain and suffering for the deep-seated mental trauma with symptoms of PTSD and major depressive disorder.

[70] The plaintiffs referred to the House of Lords case of *Alcock and others v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 where the

House of Lords set out a three-limb test in order to establish a claim for damages for pain and suffering from nervous shock as follows:

> ... Accordingly, the plaintiff could only recover if (i) his relationship to the primary victim was sufficiently close that it was reasonably foreseeable that he might sustain nervous shock if he apprehended that the primary victim had been or might be injured, (ii) his proximity to the accident in which the primary victim was involved or its immediate aftermath was sufficiently close both in time and space and (iii) he suffered nervous shock through seeing or hearing the accident or its immediate aftermath.

[71] To summarise, a nervous shock claim is permitted if there is a proximity between the plaintiff and the victim in as many dimensions as possible.

[72] The plaintiffs submitted that they had fulfilled the first limb of the test in which there was a relationship between the plaintiffs and the deceased as parents and child.

[73] The plaintiffs further submitted that there was a proximity of the plaintiffs to the incident at the time of occurrence as well as its immediate aftermath.

[74] The first plaintiff saw the deceased floating in the jacuzzi. He then immediately rushed in to lift the deceased out of the water in the jacuzzi. He then frantically administering CPR to try to revive the deceased. The first plaintiff was therefore as close to the incident as he could possibly be.

[75] As for the second plaintiff, she was at the scene experiencing the whole tragic incident firsthand. Her emotions fluctuated from hope to despair and from fear to anxiety. She then had to suffer the trauma of waiting at the hospital again with hope and despair and only to be told that she should let her son go. Again, her proximity to the deceased's demise was as pronounced as it could possibly be.

[76] Based on the evidence presented before this me, the first plaintiff suffered mental trauma due to the tragic death of his son and the profound effect that it had on him.

[77] On the other hand, the second plaintiff suffered major depressive disorder with the deep-seated and persistent symptoms which the medical experts characterised as treatment-resistant, along with PTSD.

[78] By relying on cases quoted by the plaintiff, *Siew Pick Chiang v Hyundai Engineering and Construction Co Ltd and another* [2016] SCD 360; [2016]

SGHC 266 (Tab L, PBOA) (RM281,600), *Muhamad Mustaqim bin Jidin v Mohd Zulfadhli bin Radzali & Ors* [2017] MLJU 862 (TAB M, PBOA) (RM100,000), and *Pang Koi Fa v Lim Djoe Phing* [1993] SCD 98; [1993] 3 SLR 317 (TAB N, PBOA) (RM105,600). I find no reason to deprive plaintiff of this. For the above, I grant the general damages for pain and suffering to the first plaintiff of RM30,000 and RM100,000 to the second plaintiff.

Bereavement

[79] The plaintiffs claim for bereavement was made under s 7 of the Civil Law Act 1956. However, since the unfortunate incident occurred on 18 August 2018, the pre-amendment version of the Civil Law Act 1956 shall apply.

[80] Section 7(3A) of the Civil Law Act 1956 states that a claim for damages for bereavement shall be ten thousand ringgit.

[81] Section 7(3C) of the Civil Law Act 1956 further states that where there is a claim for damages under para (3B)(b) for the benefit of the parents of the deceased, the sum awarded shall be divided equally between them.

[82] Therefore, I award the first plaintiff RM5,000 for bereavement. Equally, I award the second plaintiff RM5,000 for bereavement.

Damages for loss of enjoyment of holiday

[83] The plaintiffs were also claiming for damages of RM500,000 for loss of enjoyment of the holiday. For this, I do not find any needs for this particular instance due to the obvious reason that the incident happened at the end of their holiday.

[84] Therefore, the plaintiffs' claim for damages for loss of enjoyment of holiday is dismissed.

Medical expenses

[85] The plaintiffs submitted that as the claim for the medical treatment expenses were all properly and adequately supported, the claim should be allowed. The plaintiffs claimed SGD27,871.32 (RM98,107) for pre-trial medical expenses despite the facts that all payments were paid by second plaintiff's employer, government subsidies, and the insurer.

[86] The defendants argued that the plaintiffs did not incur the expenses for they were paid by government subsidies and insurance. They also distinguished *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ

685 and *Eng Beng v Lo Kok Jong* [2023] SCD 142; [2023] SGHC 63 quoted by the plaintiffs.

[87] In fact, in the case of *Eng Beng*, there was an order made by the High Court for the appellant to return the subsidies and grants recovered from the respondent to the relevant authorities to demolish the argument that the appellant would enjoy double recovery.

[88] I agree with the defendants on this due to the facts that the payment for the invoices were subsidised. As argued by the defendants since there is no such indication by the plaintiffs to return the subsidies should there be any award by this court on this, no award would be granted for all subsidised payment.

[89] A small fraction of the bills was indeed paid by the Medisave. However, as the defendants put it, the plaintiffs have not called anyone from the employer to verify the apportionment of contribution to the Medisave between the second plaintiff and her employer to this Medisave.

[90] Thus, for this heading, the sum to be awarded to the first plaintiff is SGD913.78 while the sum to be awarded to the second plaintiff is SGD26,383.05.

Future medical expenses

[91] plaintiffs also claimed SGD420,000 based on Dr Kwok's report, citing severe and treatment-resistant major depressive disorder and PTSD.

[92] The defendants reminded this court that Dr Kwok was not called to testify. This has deprived this court of the chance to listen directly from him as to the need for future medical treatment. They also cited DW4's testimony and claimed that the appropriate treatment is available in Malaysia. Thus, they argued that the award should be calculated based on Malaysian market rate.

[93] While I agree that treatment must be done in Singapore for the convenience of the second plaintiff, I do not have any liberty of getting the details from the treatment doctor, Dr Kwok who was of the view that it would take up to five years and cost SGD390,000 for the treatment of the second plaintiff. Dr Kwok was never called as a witness. I thus, adopt the view of PW3 and DW4 that the actual treatment needs not go that long. I reduce it to three years treatment of SGD78,000 per year. As for the devices for nasal therapy, since this would be covered by subsidies, I see no reason to award this.

Pre-trial loss of earnings

[94] The plaintiffs claimed SGD133,385, citing medical leaves and a monthly salary of SGD3,700. However, I agree with the defendants' submission that the plaintiffs did not prove the loss, citing a lack of pay slips and the contractual arrangement with the hospital she was working at.

Loss of earning capacity

[95] The plaintiffs also sought compensation for loss of earning capacity, citing persistent symptoms and the inability to perform work. The defendants argued that plaintiffs did not establish a real risk of losing their job or getting a less-paid employment. They drew a distinction between loss of future earnings and loss of capacity. I agree with the defendants on this. In fact, as submitted by the defendants, there is no proof whatsoever tendered to support this loss of earning capacity. Hence, I dismiss the claim under this heading.

Aggravated damages

[96] plaintiffs sought RM400,000 for this by citing the defendants' exceptional conduct. They cited *M Badiuzzaman and others v Salma Islam and others* [2023] SCD 463; [2023] SGHC 311 (TAB KK, PBOA) as their support.

[97] The defendants argued that aggravated damages are not intended to punish the defendants. They cited *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 (TAB LL, PBOA) for the principle of general damages for the injured feeling, stress, anxiety, or disappointment. I agree with the defendants that there is no justifiable reason to award aggravated damages in this case. Thus, I make no award under this.

CONCLUSION

[98] To sum up, this court finds that the plaintiffs have proved to this court on the balance of probabilities that the defendants are in breach of contract and/or negligence.

[99] For purpose of currency exchange, I agree with the defendants that the currency exchange applicable for the claim for pre-trial medical expenses ought to be the currency exchange at the time the cost was incurred and not the present currency exchange rates. Looking at the historical records of the currency exchange rates, I find that the rate of SGD1 = RM3.30 would be reasonable for all expenses incurred pre-trial. As for the future expenses, I have adopted the rate of SGD1 = RM3.60 for all future expenses.

[100] Therefore, I award the following damages to the plaintiffs:

(a) the sum of RM30,000 only to the first plaintiff as general damages for pain and suffering;

(b) the sum of RM100,000 only to the second plaintiff as general damages for pain and suffering;

(c) the sum of RM5,000 only to the first plaintiff as bereavement pursuant to s 7 of the Civil Law Act 1956;

(d) the sum of RM5,000 only to the second plaintiff as bereavement pursuant to s 7 of the Civil Law Act 1956;

(e) the sum of SGD913.78 only to the first plaintiff with the currency exchange rate of SGD1 = RM3.30, for pre-trial medical expenses;

(f) the sum of SGD26,383.05 only to the second plaintiff with the currency exchange rate of SGD1 = RM3.30, for pre-trial medical expenses;

(g) the sum of SGD234,000 only to the second plaintiff, with the currency exchange rate of SGD1 = RM3.60, for future medical expenses;

(h) interest; and

(i) cost of RM70,000 to be paid by the defendants to the plaintiffs.

Plaintiffs' action allowed; damages sought by plaintiffs partly awarded with costs of RM70,000 to be paid by defendants to plaintiffs.

Reported by Dzulqarnain Ab Fatar